1940 *Present :* **de Kretser J.**

FERNANDO *v.* APONSU

462—Workmen's Compensation Case C 25

Workmen's Compensation—Father's claim to be dependant of son—Son's wages go to the family fund—Father not a dependant.

is a painter who called in his son (the deceased) to assist him whenever work was available.

work was available.

The deceased's wages were paid to the claimant and he paid the son, whose wages were used to help the family fund. The claimant was a regular wage earner and he maintained the family, including the deceased.

Held, that the claimant was not a dependant of the deceased son.

APPEAL from an order of the Commissioner under the Workmens' Compensation Ordinance.

Cyril E. S. Perera, for defendant, appellant.—The admitted facts prove that the deceased was a dependant of his father, the applicant. It was the father who obtained employment for him about three months in the year. The mere fact that the deceased paid whatever he thus earned into the family fund is not sufficient to prove that the father was a dependant. *Montgomery v. Blows.*[1]

[1] *(1916) 1 K. B. D. 899.*

Section 22 of the English Act of 1923 defines a partial dependant. The contributions must be for the provisions of the ordinary necessaries of life suitable for persons in his class and position.

The respondent informed the Commissioner that he had settled the matter with the employer, and the Commissioner had no power to re-open a claim that had been waived, and in any event the applicant is out of time and no sufficient cause has been shown for the delay.

S. W. Jayasuriya, for applicant, respondent.—This is a case of partial dependency and our Ordinance follows the English Act of 1906 and the fact that the earnings of the deceased went into the family fund at the time of his death is sufficient to establish partial dependency.

The fact that the deceased son was maintained by the father when he had no employment, does not affect the respondent's claim as there was a duty cast on the father to maintain his children and under the English Act of 1906 such a claim could be maintained. *Main Colliery Co., Ltd. v. Davies*[1]; *and Hodgson v. West Stanley Colliery Co.*[2] The real test is the financial injury caused to the respondent by the death of the deceased.

The respondent was out of time, but his explanation for the delay has been accepted and that finding cannot be questioned here as it is a question of fact; and no claim was made as the employer held out a promise of employment.

Cur. adv. vult.

October 31, 1940. DE KRETSER J.—

The deceased workman met with an accident on March 12, 1938, and died on the following day. Inquiry into the applicant's claim did not take place till May 25, 1940, *i.e.*, over two years after the death.

The Government Agent, Western Province, who is the Chairman of the Provincial Road Committee, informed the Commissioner of the death on March 17. The Provincial Road Committee was getting some painting done in its office and the deceased had touched a live electric wire while at work and had met with his death as a result. He was working under a contractor at the time, one H. Lewis Fernando, according to the Government Agent. These proceedings, however, were against H. Nimonis Fernando who used to supervise the work for Lewis Fernando and who in his evidence stated that Lewis Fernando was his brother and that they worked together; he added that Lewis worked on his behalf, and that the contract was in his (respondent's) name. The Commissioner on March 23, 1938, issued a notice under section 20 (1) of the Ordinance requiring the appellant (Nimonis) to submit within thirty days a statement on the form O enclosed, giving the circumstances attending the death of the workman and indicating whether he considered himself liable or not to deposit compensation. The appellant duly filled in the form and disclaimed liability, forwarding at the same time a report in form Q under section 57 (1) of the Ordinance. He also gave a list of the funeral expenses amounting to Rs. 108.10, details of which were elaborated in a further communication which the Government Agent obtained from Lewis Fernando, the amount now coming to Rs. 113.98.

[1] *(1900) A. C. 358.*

[2] *(1901) A. C. 229.*

On June 16, 1938, the Commissioner wrote to the deceased's father, the present respondent, stating that Nimonis had disclaimed liability and telling him that if he wished to pursue the matter further he should make an application in duplicate on form B of which he enclosed two copies. He was acting under section 20 (4) probably. This letter was forwarded through the Vidane Arachchy of Dehiwala and was duly delivered to the respondent. No reply having been received, the respondent's attention was invited to it on September 5, 1938, and an early reply requested.

The respondent informed the Commissioner on September 27, 1938, that he had settled the matter and had decided not to proceed any further ; the letter was received on the 28th and is marked P 2 in the file ; it is not a document given by the respondent to the appellant, as described by the Commissioner in his order. The Commissioner wrote in reply asking for the terms of the settlement. He does not specify under what provision of the Ordinance or regulations he acted, and I have not been able to find any. The respondent by his letter dated October 24, stated that the funeral expenses were met by the contractor (appellant) and were not deducted out of his salary, and because he was employed under the contractor himself he had settled the matter " for his future prospect ".

The Commissioner now proceeded to take up with the Chairman of the Provincial Road Committee the question of *his* liability for the accident, and in the course of the correspondence he took up the position that compensation should not be paid otherwise than by deposit with him ; he referred to section 11 (1). This is the first indication there is as to the reason which prompted the Commissioner not to accept the decision of the respondent.

Now, section 11 (1) expressly refers to the payment of compensation by an employer who seeks to fulfil his obligation in this way. It has nothing to do with the right of the claimant to drop his claim. The very fact that the Ordinance prescribes a period within which a claim should be made carries with it the implication that the employer's liability is not so absolute that it must be discharged irrespective of the wishes of the claimant. The appellant had not reported the payment of any compensation by him ; in fact he had disclaimed liability. Nor had the claimant reported the payment of any compensation ; he had given reasons why he did not wish to pursue the matter. He was the best judge of his own interests. In effect what he said was that his employer had been exceedingly kind to him in his time of distress and that he did not wish to spoil his chances of future employment. One can well understand that he may have preferred to secure employment rather than force a claim and so find himself out of employment.

Section 20 (4) alone applied, and that had been complied with and there was no call upon the Commissioner to pursue the matter further. Solicitude for the workman is commendable, but it should not be carried to such a point that it may be construed as encouragement, if not incitement, to a workman to prefer a claim. The Ordinance has the welfare of the workman before it quite prominently and it makes ample provision for his protection, and I can find no justification for the Commissioner going outside the bounds of the Ordinance.

After protracted correspondence with the Chairman of the Provincial Road Committee, apparently the Chairman's position that he was not liable was acknowledged to be correct, but as the Chairman's liability was laid under section 22 the correspondence referred to the liability of the appellant.

The return (P 3) shows that between March, 1937, and October of the same year the deceased was more often absent than at work; and from June to September he earned nothing. And on this return the Commissioner decided that compensation should be assessed in terms of section 7 (1) (c). That was on July 6, 1939. On September 11, the respondent wrote to the Controller of Labour inquiring whether the latter could compensate him. There was still no formal *claim.*

On October, 28, the Commissioner drew his attention to his previous letter and inquired whether he had now changed his mind and wished to make a claim for compensation against the contractor, adding "you should also explain why you delayed so long to make the application". On November 18, the respondent replied that he had changed his mind, that he had signed the letter at that time not knowing its contents at all as the contractor promised to compensate him, and that the delay was due to his "patient and hopeful expectation" that the contractor would keep his promise. (The later correspondence is typed.) Then the Commissioner, by his letter dated December 13, informed him that he might make an application (sending him the forms) and also told him that he should be able to show that the delay was due to sufficient cause. The claimant then made the present application on January 21, 1940. He alleged he was the only dependent of the deceased workman. The appellant filed an answer to this claim, and the inquiry took place on May 25, 1940.

In his evidence the claimant stated that the deceased did not get work every day but only whenever work was available. The claimant was a painter, and whenever the appellant had work requiring extra hands the claimant called in his son (deceased) whose wages were paid to the claimant, and he paid the son whose earnings "always used to help the family fund". The appellant then gave evidence to the effect that the deceased had been employed by him off and on. The Commissioner then framed issues, after which evidence was again called.

The claimant had already stated that he used to go fishing sometimes but that his son did not. His witness said that the son used to be taken by the father when additional labour was required, that the son had no other employment, and that when he had no work he was maintained by his father. The appellant gave evidence to the effect that he paid the wages of the deceased to his father (claimant) who was regularly employed by him and brought in his son to assist him.

The Commissioner held that the deceased and his father used to go to work together, that the deceased's earnings were paid into the family fund. Therefore the claimant was a dependant of the deceased but that there were other dependants, viz., deceased's mother, his younger brother and unmarried sister. He held that the amount paid for the funeral was not

by way of compensation, and that the claimant had sufficient cause for delaying to make his application because he was expecting to be paid something more by way of compensation and was not so paid.

In the petition of appeal it was submitted that deceased was not a workman within the meaning of the Ordinance, but this point had been conceded before the Commissioner and so was not mentioned in appeal. The chief point argued before me was that the claimant was not a dependant of the deceased. It was also contended that the omission to make a claim in time had not been sufficiently explained nor was there any reason why the letter P 2 should not have been given effect to.

The question as to whether a person is a dependant or not is a question of fact, and each case must be decided on its own merits. This was decided by the House of Lords in the case of *The Main Colliery Co., Ltd. v. Davies.*[1] In that case the son was a regular wage-earner and gave the parents all his wages, they providing him with food, lodging, clothes and pocket money; the father was held to be a dependant. In *Hodgson v. West Stanley Colliery Co.*[2], a father and his two sons were regularly employed in a colliery and were killed in one and the same accident. Their earnings had formed a common fund out of which the whole household were maintained. The mother was held to have been dependant upon the earnings of her sons. In *Montgomery v. Blows*[3], the claimant was a married woman who lived with her husband and children. Her father, the deceased workman, had lodged with them, paying a fixed sum every week towards the household expenses. It was held that the husband provided the home and the whole means of living, and if there was any profit it belonged to him; and therefore if anybody could be said to be a dependant it was the husband who, however, was not entitled to claim under the Act.

Now, in the present case the mere use of a phrase like "the family fund" does not decide the issue. It is quite plain that the father, *i.e.*, the claimant, was a regular wage-earner and maintained the family, including the deceased. Such earnings as came from the deceased were occasional and were due to the father's taking him on as an assistant. In other words the deceased depended on his father even for employment. It is true that when the deceased did earn something, to that extent the father was relieved, but in my opinion it was entirely wrong to say that the father was in any way dependant on the earnings of the son.

The terms of the Ordinance are neither those of the English Act of 1906 nor of the amending Act of 1923. I have considered cases under the former Act as they would be the cases most favourable to the respondent and have endeavoured to show that the respondent would not be entitled to claim. Each case must depend on its own facts. Therefore, on the facts before the Commissioner I hold that the claim should not have been allowed and this appeal will be allowed with costs.

This decision obviates the necessity for deciding the other points which were raised. I may state, however, that in section 2 of the English Act the words are "unless the claim for compensation with respect to such accident has been made", whereas in our Ordinance we have the phrase

[1] *(1900) A. C. 358.* [2] *(1910) A. C. 229.*
[3] *(1916) 1 K. B. 899.)*

"unless the claim has been instituted". Under the English Act it was held that the term "claim for compensation" referred to the notice of a claim for compensation sent to the employer and not to the initiation of proceedings before the tribunal for assessing the amount of the compensation—*Powell v. Main Colliery Co.*[1], and provision was made in the English Act that failure to make a claim within the specified period should not be a bar if it were found that it was due to mistake, absence from the kingdom, or other reasonable cause. Under our law the Commissioner is empowered to admit the claim if he is satisfied that the failure was due to sufficient cause. What the effect of these differences in phraseology is may be left to be determined on another occasion. Suffice it to say that there is no evidence in this case of notice of any claim having been sent to the appellant other than the notice sent by the Commissioner under the regulations, and that if the matter had been open I should have found it difficult to say that the explanation offered by the respondent could stand examination.

Appeal allowed.